88-509

Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

VITO GIACALONE,
MARIO AGOSTA,
ALBERT HADY,
JACK V. GIACALONE,
ANTHONY D. GIACALONE,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether, when a preliminary showing is made that statements attributed to informants in an application and affidavit for an electronic surveillance order are pervasively false, the Government should be required to produce the informants *in camera*, to verify their existence and confirm that they made the statements attributed to them?

II.

Whether the particularity requirements of Title III of the Organized Crime and Safe Streets Act of 1968 are met by describing the conversations to be intercepted solely by designating which statutes evidence of violation is sought?

III.

What preliminary showing is necessary to require an evidentiary hearing as to alleged violations of the "minimization" provisions of an electronic surveillance order?

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OPINION BELOW

Petitioners pleaded guilty to violations of 18 U.S.C. §§ 1955 and 1962(d) in the United States District Court for the Eastern District of Michigan under the provisions of Rule 11(a)(2), Fed. R. Crim. P., reserving their right to appeal the denial by the trial judge of two motions regarding the electronic surveillance orders which had led to the acquisition of the bulk of the evidence upon which their prosecution was based. On August 5, 1988, the United States Court of Appeals for the Sixth Circuit filed its opinion (set forth hereinafter as Appendix A) affirming the denial of those motions.

JURISDICTION

The Six Circuit's Opinion was filed August 5, 1988. This Court's jurisdiction to review the decision of the Court of Appeals by Writ of Certiorari is invoked under 28 U.S.C. § 1254(1).

PROVISIONS OF LAW INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 2518, Title 18; United States Code, provides in pertinent part:

> (1) Each application for an order authorizing or approving the interception of a wire, oral, or electronic communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and

shall state the applicant's authority to make such application. Each application shall include the following information:

* * *

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) except as provided in subsection (11), a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

* * *

(4) Each order authorizing or approving the interception of any wire, oral, or electronic communication under this chapter shall specify —

* * *

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

* * *

(5) * * * Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days. * * *

* * *

(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

STATEMENT OF THE CASE

On June 5, 1986, a three-count indictment was returned in the United States District Court for the Eastern District of Michigan, Southern Division, charging Petitioners and others with violations of 18 U.S.C. §§ 1962(d) (conspiracy to run an enterprise by gambling), 1955 (gambling), 371 (conspiracy), and 2 (aiding and abetting). (R. 1: Indictment of June 5, 1986.)[1] The principal source of the evidence against the Petitioners was certain court-ordered electronic surveillance authorized under Title III, 18 U.S.C. § 2518. The Petitioners initially pled not guilty.

On January 6, 1987, the Petitioners filed two motions to suppress. The first motion, based on an offer of proof, called into question the veracity of the affidavit supporting the Title III application[2] to conduct electronic surveillance of a produce business, Farm Fresh Produce, Inc., in Detroit, Michigan. It also requested a hearing on the issue of the affiant's veracity. In connection with the hearing, it requested that the District Court hold an *in camera* examination of the supposed informants on whose allegations the application for the Title III surveillance rested. (R. 118: *Franks* Motion of January 6, 1987.)

The second motion called into question, not only the Order of July 28, 1982, but also three additional orders of August 30, 1982, October 1, 1982, and November 5, 1982. (R. 114: Suppression Motion of January 6, 1986.) It challenged the orders and their execution on four independent, but related, grounds:

1. inadequate showing of probable cause (18 U.S.C. § 2518(1)(b));

2. lack of particularity (18 U.S.C. § 2518(1)(b)(iv));

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[1] References to the record on appeal shall be made as follows:

"R. [entry number on docket sheet]: [brief description of subject matter]."

[2] The wiretap application was granted by the District Court in its Order of July 28, 1982.

3. insufficient exhaustion of normal investigative procedures (18 U.S.C. § 2518(1)(c)); and

4. failure to minimize (18 U.S.C. § 2518(5)).

It also requested, based on an offer of proof, an evidentiary hearing on the issue of minimization.

The motions were denied by the District Court in unpublished opinions. (R. 257: Opinion of May 27, 1987 (informant identification denial); R. 258: Opinion of May 27, 1987 (*Franks* denial); R. 269: Opinion of June 2, 1987 (suppression denial).) On June 10, 1987, these Petitioners entered into a plea agreement, which reserved their right to appeal these orders under Fed. R. Crim. P. 11(a)(2). (R. 287: Plea Agreement of June 10, 1987.)

On August 5, 1988, the United States Court of Appeals for the Sixth Circuit filed its Opinion affirming the trial court's resolution of the issues raised by petitioners' motions. (Appendix A) Petitioners seek a Writ of Certiorari to review the decision of the Court of Appeals.

REASONS FOR GRANTING THE WRIT

I

AN IN CAMERA HEARING SHOULD HAVE BEEN HELD IN WHICH THE INFORMANTS, WHOSE INFORMATION WAS USED TO SECURE THE TITLE III ORDER OF JULY 28, 1982, WERE CALLED TO VERIFY THEIR EXISTENCE AND THEIR ALLEGED STORIES.

In *Franks v. Delaware,* 438 U.S. 154, 155 (1978), this Court, as a matter of constitutional law,[3] held:

> Where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request.

The Court, too, emphasized that the impeachment permitted was of the "affiant, not of any non-governmental informant." *Id.* at 171. In addition, it expressly reserved "the difficult question whether a reviewing court must ever require the revelations of the

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[3] The arguments in the District Court were phrased largely in constitutional terms. In fact, a similar result may be reached by a consideration of Title III's text. Subsections (b) (probable cause), (c) (necessity) and (e) (prior applications) of U.S.C. § 2518(1) require that a Title III application contain "full and complete" statements. As noted below (*see infra* page 17), "full" means "to the highest degree;" "complete" means "not lacking anything necessary." Obviously, if the statements include false information, they may be "full" enough to warrant the issuance of an order, but they would hardly be "complete," since they would lack something necessary: The fact that they were worthy of trust. The differences between the constitutional standard and its statutory counterpart are two-fold: (1) The requirement of materiality found in the constitutional rule, but not in the statute, and (2) the state-of-mind requirement (knowledge or recklessness) found in the Constitution, but not in the statute (knowledge, i.e., belief in (b); no state of mind (c), and knowledge, i.e., "known" in (3), but not, in any case, recklessness). *But see United States v. Van Horn,* 789 F.2d 1492, 1500 n.6 (11th Cir.) ((b) not strict liability), *cert. denied,* 107 S. Ct. 190 (1986).

identity of an informant once a substantial preliminary showing of falsity has been made." *Id.* at 170.

Since 1979, federal and state courts have struggled with *Franks'* unanswered question. *See generally W. La Fave, Search and Seizure* 4.4(d) (2nd ed. 1987) (hereinafter *La Fave) (Franks* procedural matters cases reviewed and conclusion: "[I]t is seriously to be doubted whether it is constitutionally permissible simultaneously to impose the full burden of proof on the defendant and withhold from him facts critical to meeting that burden."). Different approaches have been followed. Assuming that some minimal showing is made that the affidavit for the warrant contains false information,[4] the key issue — a Catch-22 dilemma[5] — is always: How can the defendant meet his *Franks*

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[4] Uniformly, mere denials of the accuracy of the information in the affidavit by the defendants are held to be insufficient. *See, e.g., United States v. Barrientos,* 758 F.2d 1152, 1159 (7th Cir. 1985), *cert. denied,* 474 U.S. 1062 (1986). Where the defendants offer, however, a possible identification of the informant and a contradictory affidavit by that person, courts are willing to go further. *See. e.g., United States v. Barone,* 787 F.2d 811, 814 (2nd Cir. 1986) (*in camera* examination of affiant); *United States v. Kiser,* 716 F.2d 1268 (9th Cir. 1983) (*in camera* examination of affiant); *United States v. Luna,* 525 F.2d 4, 6 (6th Cir. 197) (testimony taken from identified informant and agents and field notes examined in open hearing on motion to suppress), *cert. denied,* 424 U.S. 965 (1976). Other kinds of evidence that cast into sharp question the veracity of the affiant are also accepted. *See. e.g., United States v. Brian,* 507 F. Supp. 761, 766 (D.R.I. 1981) (inconsistency of informant allegations and wiretap transcripts), *aff'd sub nom., United States v. Southhard,* 700 F.2d (1st Cir.) (Bownes, C.J., with Peck, J. of 6th Cir. sitting by designation) (*in camera* examination of affiant), *cert. denied sub nom. Ferris v. United States,* 464 U.S. 823 (1983).

[5] *See* J. Heller, *Catch-22* 47 (Del. 1985):

> There was only one catch and that was Catch-22, which specified that a concern for one's own safety in the face of dangers that were real and immediate was the process of a rational mind. Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions. Orr would be crazy to fly more missions and sane if he didn't, but if he was sane he had to fly them. If he flew them he was crazy and didn't have to; but if he didn't want to he was sane and had to. Yossarian was moved very deeply by the absolute simplicity of this clause of Catch-22 and let out a respectful whistle.

burden of showing that the false information is from the affiant, and not the informant, when the defendant does not know who the informant is and cannot seek an affidavit from the informant contradicting the affiant's story, unlike *Franks*, where the third party's information was from a named source?

Decisions of various courts fail to recognize — or ignore — the dilemma. *See, e.g., State v. Baca*, 84 N.M. 513, 505 P.2d 856 (1973) (merely showing false information insufficient, since it does not attack veracity of affiant). Some courts order the informant's identity disclosed merely upon a showing that disclosure is "relevant and helpful to the defense." *See, e.g., People v. Dailey*, 639 P.2d 1068, 1077 (Colo. 1982).[6] Others order *in camera* hearings to take testimony *of the affiant. See, e.g., United States v. Missouri*, 644 F. Supp. 108, 113 (E.D. Mich. 1986) (not clear if affiant is required to identify informant to Court).

But the better-reasoned decisions — both before and after *Franks* — recognize the aptness of *in camera* hearings to disclose the identity of the informant and/or take testimony *from the informant. See, e.g., United States v. Licavoli*, 604 F.2d 613, 621 (9th Cir. 1979), *cert. denied*, 446 U.S. 935 (1980); *State v. Wolken*, 103 Wash. 2d 823, 700 P.2d 319 (1985); *People v. Freeman*, 121 Ill. App. 3rd 1023, 460 N.E.2d 125 (1984); *State v. Chase*, 439 A.2d 526, 531 (Maine 1982) (citing *United States v. Harper*, 609 F.2d 1198 (6th Cir. 1979)); *Commonwealth v. Douzanis*, 384 Mass. 434, 425 N.E.2d 326 (1981); *People v. Poindexter*, 90 Mich. App. 599, 607, 282 N.W.2d 411, 415 (1979); *People v. Darden*, 34 N.Y.2d 177, 356 N.Y.S.2d 582, 313 N.E.2d 49 (1974) (the so-called "*Darden* hearing").

"That's some catch, that Catch-22," he observed.

"It's the best there is," Doc Daneeka agreed.

[6] *See also United States v. Harper*, 609 F.2d 1198 (6th Cir. 1979) (informant's identity not disclosed by District Court; reversed on appeal, since identity necessary to determine if Fourth Amendment violation by police (illegal entry by informant) may have occurred).

Petitioners moved on June 6, 1987 for an order requiring an *in camera* examination of the informants, an evidentiary hearing under *Franks,* and the suppression of the evidence obtained from the Title III Order of July 28, 1982. They attached to their motion a series of affidavits from those whom the informants accused of extortion related to the produce business, the alleged victims of the extortions themselves, and other relevant witnesses. These affidavits utterly destroyed the probable cause basis, on which the Title III Order was issued, for extortion relating to the produce business. Because Petitioners did not know who the informants were, they could not, of course, take statements from them, and so they were not in a position to allege that the affiant, rather than the informants, was responsible for the false information in the application. Accordingly, they requested that the District Court hold an *in camera* hearing, preliminary to a *Franks* hearing, to question the informants.

Candidly conceding "the difficult evidentiary burden placed on defendants [in this] situation," government, nevertheless, strenuously objected to the adequacy of the affidavits produced by Petitioners to justify any kind of hearing into the veracity of FBI's affiant or of the informants — preliminary to a full *Franks* hearing or otherwise. (R. 103: Government's *Franks* Memorandum of February 6, 1987, at 3 (hearing), 27 (difficult burden).) Recognizing the government's fears "that if the informants are produced for an *in camera* examination, their identity . . . [might] be revealed and their lives will be placed in danger," the District Court chose to examine only the affiant *in camera,* and then it concluded, based on its examination of only the affiant, that no reason was shown to doubt the affiant's veracity. (R. 257: Opinion of May 27, 1987 (informant denial) at 5 (danger), R. 258: Opinion of May 27, 1987 (*Franks* denial) at 2.)

Petitioners argued in the Court of Appeals that the District Court's decision not to ascertain the informants' identities and cross-check their allegations against the FBI agent's affidavit, by calling them in an *in camera* hearing, as requested by them, was a manifest abuse of discretion. They had placed before the Court

significant evidence showing that allegations in the affidavit were untrue. The evidence left but two possible conclusions: The affiant was careless and/or over zealous, or he had deliberately lied in order to establish probable cause. In either case, a mere *in camera* examination by the Court of the affiant was insufficient. Clearly, whatever led the affiant to provide the initial, erroneous affidavit, his motive during the *in camera* examination by the Court would be to cover up that prior falsity, and the chance of revealing such conduct would be slim, particularly in the absence of highly motivated defense counsel to subject him to adversarial cross-examination.

The prosecution, at this juncture, was profoundly disturbing. The "informant" allegations against the Petitioners and the others had been refuted factually by counter-affidavits by no less than *the supposed victims themselves. Extensive electronic surveillance had been undertaken of the suspects, but no evidence of the alleged extortion had been overheard.*[7] Instead, the government had seized gambling information for which it had lacked probable cause to conduct surveillance in the first instance. Significantly, too, instead of disclosing the progress reports and the Section 2517(5) orders and applications, in which the government had to justify *ex parte* to the District Court the sharp turn in its investigation's character (from extortion in connection with the produce business to other offenses), the government steadfastly refused to turn the reports, orders and applications over. (R. 201: Government's § 2517, etc. Memorandum of February 17, 1987 at 4, 6.)

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[7] Usually, of course, a search may not be undermined or justified by what it does or does not turn up. *See, e.g., Hill v. California,* 401 U.S. 797, 804 (1971) (search not undermined merely because wrong man arrested); *Byars v. United States,* 273 U.S. 28, 29 (1927) (search not justified solely because counterfeit items in fact found). Here, however, the affiant's integrity, not the warrant's character as a basis for a probability judgment, was at stake. Accordingly, the District Court should not have shut its eyes to the fact that evidence of extortion related to the produce business *was not found,* a circumstance that substantially corroborated the charge that the affidavit was tainted by false information.

The government's fear of danger to the lives of the informants could not, of course, be ignored, but it ought not have, standing alone, carried the day. Professor Grano puts it well:

> The proper remedy is to devise further protections, and not to eliminate the hearing. For example, the place and time of the in-camera meeting need not be disclosed; if deemed necessary, another judge of undisclosed identity could conduct the in-camera hearing.

Grano, *A Dilemma for Defense Counsel Spinelli-Harris, Search Warrants and the Possibility of Police Perjury*, 1987 U. Ill. L. Rev. 405, 446-47. So, too, did the New York Court of Appeals in *Darden*, 34 N.Y.2d at 181-82, 356 N.Y.S.2d at 585-86, 313 N.E.2d at 52:

> [T]he Court regards it as fair and wise . . . where there is insufficient evidence to establish probable cause apart from the testimony of the arresting officer as to communications received from an informer, when the issue of identity of the informer is raised at the suppression hearing, for the suppression Judge then to conduct an in camera inquiry. The prosecution should be required to make the informer available for interrogation before the Judge. The prosecutor may be present, but not the defendant or his counsel. Opportunity should be afforded counsel for defendant to submit in writing any questions which he may desire the Judge to put to the informer . . . .
>
> The weighty considerations countervailing against disclosure of the identity of police informers are evident - 'the furtherance and protection of the public interest in effective law enforcement.' . . . Assuring the desirable flow of useful information to the police will, of course, depend on predictable and reliable assurances that anonymity of informers will be preserved. The question as to when and in what manner, if at all, identity of the informer and verification of his communication should be established calls for a sensitive and wise balancing of the rights of the individual defendant and the

> interests of the public. Such a procedure . . . [of *in camera* disclosure guards] against the contingency, of legitimate concern to a defendant, that the informer might have been *wholly imaginary* and the communication from him *entirely fabricated.* At the same time, the legitimate interests of the police in preserving the anonymity of the informer [are] . . . respected.

(citations omitted and emphasis added).

The inadequacy of the reasons offered to justify the District Court's course of action contrasts sharply with the Ninth Circuit's reasons in *United States v. Thompson,* 827 F.2d 1254 (9th Cir. 1987) for rejecting the use of *in camera* proceedings to test alleged prosecutorial abuses in dismissing proposed jurors. *But see, United States v. Davis,* 809 F.2d 1194, 1201-03 (6th Cir.) (uniform procedure not adopted), *cert. denied,* 107 S. Ct. 3234 (1987). In *Thompson,* the government conceded that the defendant had made a prima facie case of abusive prosecutorial discretion. The issue then turned on the adequacy of the government's justification for its use of peremptory challenges. What of an *ex parte* procedure? The Court recognized that a district court had broad discretion, but then it qualified that concession by the counter-consideration that "adversary proceedings are the norm in our system of criminal justice." *Thompson,* 827 F.2d at 1257 (citing *United States v. Bagley,* 473 U.S. 667, 675 (1985)). *Ex parte* proceedings were the disfavored exception. *Id.* Acknowledging that deference was due to a district court, it noted that such "deference is not without limits." *Id.* at 1258. The district courts may not adopt procedures that impair a defendant's constitutional rights. *Id.* (citing *Franks,* 438 U.S. at 171-72; *Licavoli,* 604 F.2d at 621). The Court then observed:

> Inquisitorial proceedings, where the judge takes an active role in ferreting out the truth, may be the rule elsewhere in the world, but they are decidedly alien to our way of thinking. Our judges usually have neither the time, nor the means, nor the training to investigate facts pertaining to the cases before them. Even on matters of law, our judges must

> rely heavily on counsel to come up with the arguments and citations supporting their respective positions.

Id. It recognized, of course, that departures from the norm existed. *Id.* (citing *United States v. McLaughlin*, 525 F.2d 517, 519 (9th Cir. 1975) (*in camera* hearing to determine if identity of informant needed to be revealed to disclose exculpatory evidence), *cert. denied*, 427 U.S. 904 (1976)). Such exceptions were, the Court acknowledged, "uneasy compromises with some overriding necessity. . . ." *Id.*

The Court of Appeals failed to acknowledge any of these considerations, but merely upheld the action of the trial court as not constituting an abuse of its discretion. Not only does that court's opinion bespeak an insensitivity to the interests protected by *Franks*, but it demonstrates as well a need for this Court to specifically address the question of what response is called for a substantial preliminary showing of the pervasive falsity of information attributed to informants relied on by an affiant, as opposed to that information as to which the affiant claims to have knowledge.

While Petitioners have never contended that an adversary proceeding was required to determine, at least initially, if the informants existed or if their stories were wholly fabricated, the *Thompson* decision does point out why an essentially passive, *in camera* proceeding, as was conducted here, is simply not adequate. Petitioners were not entitled initially to an adversary hearing, but they were entitled to a District Court that adopted truth-seeking techniques that were, as nearly as possible, its functional equivalent. No defense counsel worth his salt, in short, would have merely questioned the affiant, had the initial proceeding been adversarial. Cf. *Kimmelman v. Morrison*, 106 S. Ct. 2574, 2583 (1986) (failure to make investigation and motion to suppress was "unprofessional error . . . [that] upset the adversarial balance between the defense and prosecution.").[8] The

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[8] *See, e.g., United States v. Barbour*, 813 F.2d 1232, 1234-35 (D.C. Cir. 1987) (ineffective assistance of counsel rendered at trial by failure to interview

crucial issues were: (1) Did the informants exist? and (2) Did they tell the FBI agents what the agents say they did? Calling the informants in an *in camera* hearing and asking them what they said are the two best ways to determine the answers to these simple questions.[9] If the informants cannot be produced or they

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and call relevant witnesses and conduct vigorous cross-examination, but no prejudice); *Nealy v. Cabana*, 764 F.2d 1173, 1177-78 (5th Cir. 1985) (ineffective assistance of counsel rendered at trial by failure to interview and call possible alibi witnesses); *Thomas v. Lockhart*, 738 F.2d 304, 308 (8th Cir. 1984) (ineffective assistance of counsel by relying on police file and not interviewing rape victim, police officers who conducted investigation, or possible alibi witnesses); *United States v. Baynes*, 622 F.2d 66, 69 (3rd Cir. 1980) (hearing ordered, since ineffective assistance of counsel may have been rendered at trial by failure to seek voice exemplar to refute trial identification of defendant on wiretap).

[9] Are the allegations attributed to the informants, in fact, pure fantasy? Absent a meaningful, adversarial hearing, the truth cannot be determined reliably. The showing made by the Petitioners, however, raises the distinct possibility that perjury was committed. It is not wholly implausible that one or more of the FBI agents fabricated out of thin air the existence of one or more of the supposed informants or their basic stories. Nevertheless, it is perhaps more likely that the agents merely embellished their sources' stories; like Rumpelstiltskin, they spun gold from straw. *See, e.g., United States v. Cortina*, 630 F.2d 1207 (7th Cir. 1980) (*Franks* hearing rejected in RICO investigation and prosecution by FBI and Chicago Organized Crime Strike Force, since it was not shown affiant or informant lied; later, FBI's file on informant, to be called as witness at trial, was turned over to the government's lawyer and then to the defense, showed that information attributed to the informant had not been supplied by her; deliberate misrepresentation by FBI agent was then established rather easily and evidence suppressed).

How that straw came to be spun into gold may be inferred. Until 1980, the Department of Justice operated under an informal limitation of less than one hundred (100) wiretaps per year. With the change in administrations, a reinvigorated drive on organized crime was begun, and the number of wiretaps drastically increased. *Wiretap Report: Administrative Office of the U.S. Courts for 1986* (Table No. 7) (1980-81; 1984-289). Over the years, Mr. Giacalone was, as the undisputed record shows, the target of electronic surveillance on at least ten occasions: On eight of the taps, he was not overheard; only one prosecution resulted, and it ended in an acquittal after a jury trial. (R. 114: Suppression Memorandum of January 6, 1987 at 3.) Obviously the agents were frustrated, but then they learned that Mr. Giacalone planned to start up a produce business. Given his background, gossip about this business could well be expected. (In fact, if Mr. Giacalone planned to use the business as a front for illegal activity it would be unlikely that he would undermine its cover by operating it illegally, and it is doubtful, too, that experienced agents themselves

deny, in whole or in part, the statements the agent attributed to them, the Court should go further, by examining the affiant, his files and other evidence to determine whether the affiant may be believed. Questioning the agent is, in short, the point where honest inquiry may end, but not both begin and end. While the District Court ought to be afforded discretion in how to conduct the *in camera* hearing, it ought not be permitted to adopt a fatally flawed strategy, when a fool-proof tactic is readily available and easily accomplished. III W. Blackstone, *Commentaries* 368 (1768) put it well long ago:

> [T]he best evidence the nature of the case will admit of shall always be required, if possible to be had; but if not possible then, the best evidence that can be had shall be allowed. . . . So, no evidence of a discourse with another will be admitted, but *the man himself must be produced.*

[emphasis added)

It was a clear abuse of discretion for the District Court, therefore, not to identify the informants and test their allegations

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would have believed the gossip.) Informants might pass along such general rumors. Artfully manipulated by debriefings conducted by leading questions and with the answers carefully phrased, those informant rumors might be spun into "probable cause." *See Cortina*, 630 F.2d at 1211 & n.3, 1213, 1214 & n.4 (District Court comment endorsed by Circuit Court: "J. Edgar Hoover would be rolling over in his mausoleum if he heard . . . [Agent Brown] in this courtroom"; final affidavit "substantially more incriminating" than draft; contact reports did not substantiate the most serious allegations in the affidavit). Indeed, in all likelihood, the agents did not, in fact, try to verify the rumors, assuming they were in circulation, by interviewing the supposed victims and getting them to wear wires to record their conversations with the suspects; the agents knew the gossip would, in fact, not stand up. Instead, they turned the rumors into a Title III Order, which was obtained as part of an understandable, but regrettable, effort to obtain evidence for other offenses, for which they had even less probable cause to investigate with electronic surveillance. While perhaps less sinister than outright perjury, such a scenario would be no less illegal. *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting) ("The greatest dangers to liberty lurk in insidious encroachment of men of zeal, well-meaning but without understanding."); *Cortina*, 630 F.2d at 1217 ("[I]ndividuals and . . . court[s] must [not] stand defenseless to offenses [like perjury] committed against their rights and in flagrant violation of procedures designed to protect those rights.").

in an initial, *in camera* hearing. Only such a preliminary hearing, vigorously conducted, could adequately "prevent the perpetration of a fraud upon, and the making a mockery of, the judicial process." *United States v. Jenkins,* 728 F.2d 396, 399 (6th Cir. 1984) (Peck., J. concurring). *See also United States v. Lora,* 525 F.2d 4, 8 (6th Cir. 1975) ("mockery") (Edwards, J.), *cert. denied,* 424 U.S. 965 (1976). Accordingly, if this Court is to vindicate the role of an independent judiciary, it must require a trial judge, faced with a substantial showing that information attributed to informants is false, to hold a meaningful hearing as to whether the informants, or their information, actually existed, or could have in fact been credited by the affiant.

II
THE INITIAL ELECTRONIC SURVEILLANCE ORDER FAILED TO ADEQUATELY DESCRIBE THE COMMUNICATIONS TO BE INTERCEPTED

Revulsion with exploratory searches and "general warrants" was a motivating factor behind the Declaration of Independence, and the prohibition of such searches, encompassed in the requirement that warrants "particularly describe . . . the persons or things to be seized" is a central theme of the Fourth Amendment. *Berger v. New York*, 388 US 41, 58 (1967) Similarly, the "particularity" requirements of Title III are of central importance and constitutional dimension.

Particularity is required both for an application for electronic surveillance order, and the order itself. Thus, 18 USC 2518(1)(b)(i) and (iii) require that an application include both "details as to the particular offense that has been, is being or is about to be committed," and "a particular description of the type of communications sought to be intercepted." Similarly, 18 USC §2518(4)(c) requires an order authorizing or approving the interception of wire or oral communications to include:

> a particular description of the type of communication sought to be intercepted *and* a statement of the particular offense to which it relates; [emphasis supplied]

It is apparent that the particularity requirements of Title III are two-fold — to be adequate, the application and order must not only state "the particular offense to which" it is anticipated that intercepted communication will relate, but *also* must contain "a particular description of the type of communication sought to be intercepted." However, the applications and orders in the case at bar confine their description of communications which might be intercepted to a statement as to the offenses to which the communications may relate, and in no way define, particularize or limit the "type of communications" which might be intercepted, as the statute requires. The principal deficiency here lies, of course, with the orders, since it was the judicial orders which

should have served the function of limiting the scope of agents' intrusion into the privacy of the subjects of the interception. In failing to particularize the authority to search beyond a statement as to the offenses which might be investigated, the orders not only failed to comply with the statutory (and underlying constitutional) requirements of particularity, but also introduced an element of vagueness and uncertainty into their commands which rendered them overbroad in a more fundamental sense, and is equally fatal to them.

Although each of the applications and orders is similar in format, this discussion will focus on the application and order of July 28, 1982, for two reasons. First, because the initial application and order are uncomplicated by the facts adduced by investigative development, and second because if the first order is seen to be defective, that defect is fatal to all the succeeding orders, inasmuch as the probable cause showings of the following orders are predicated upon the fruits of the earlier interceptions.

The application upon which the order is predicated alleged that the offenses under investigation are violations of 18 USC §1951 and 1952, "that is, the obstruction, delay or interference with commerce by threats, violence, and extortion, and/or the attempt to and conspiracy to obstruct, delay and interfere with commerce by threats, violence and extortion and the interstate travel or transportation, or the use of a facility including the mail in aid of a racketeering enterprise. . . ." The "particular wire and oral communications to be intercepted" are described as follows:

> In particular, these wire and oral communications will concern an offense or offenses involving the obstruction, delay and interference with commerce by threats, violence and extortion, and/or the attempt to and conspiracy to obstruct, delay and interfere with commerce by threats, violence and extortion and the interstate travel or transportation, or the use of a facility including the mail in aid of a racketeering enterprise in violation of Section 1951 and 1952 of Title 18, United States Code. (Application ¶4 (b))

The order authorizing the interceptions sought is framed in precisely these same terms. Paragraph (a) is a finding of probable cause that the named subjects "have committed and are committing an offense or offenses involving the obstruction, delay or interference with commerce by threats, violence and extortion and/or the attempt to and conspiracy to obstruct, delay or interfere with commerce by threats, violence and extortion and the interstate travel or transportation or the use of a facility including the mail in aid of a racketeering enterprise in violation of Sections 1951 and 1952, of Title 18, United States Code." Paragraph (b) finds probable cause to believe that "evidence of the commission of the above described offenses" by the named subjects will be obtained through interception of their oral and wire communications."

In what is probably a technical violation of the statute, the order does not contain an explicit finding pursuant to §2518(3)(b) that there is "probable cause for belief that particular communications concerning that offense will be obtained through such interceptions," but the order does go on to authorize the interceptions of communications. The order does not, however, further particularize the type of communications which might be intercepted under it, beyond its authorization to intercept communications "concerning the above described offenses."

Thus, the order fulfills only one half of the statutory command — it contains "a statement of the particular offense to which" the communications to be intercepted will relate, but it wholly fails to particularly describe "the type of communication sought to be intercepted" in relation to such alleged offenses.

In line with a number of decisions from other Circuits, the courts below upheld orders which merely describe the communications to be intercepted in terms of the violations under investigation, *e.g., United States v. Licavoli,* 604 F2d 613, 620 (9th Cir. 1979); *United States v. Cohen,* 530 F2d 43, 45-46 (5th Cir. 1976); *United States v. Tortorello,* 480 F2d 764, 780-781 (2nd Cir. 1973), there are compelling reasons why this Court should reject this holding, and these decisions.

First, it does not appear that this Court has decided the issue, or in any way adopted the rule of these cases. Secondly, the decisions seem wrong as a simple matter of statutory construction, since allowing a description of communications simply by reference to "the offense to which it relates", effectively reads the first half of the particularity requirement of §2518(4)(c) out of existence — the requirement, beyond relating the communication to an offense, that the order contain a "particular description of the type of communication to be sought." (Interestingly, cases upholding the sufficiency of such descriptions do not even discuss this point; it may be that the argument made here was not made in those cases.) Thirdly, these decisions have been soundly criticized by the commentators.

Professor Carr, for example, has written:

> Acceptance of the applicant's statement of probable cause as satisfaction of the particularization requirement disregards the distinct functions of the two requirements, however, and has dubious validity. The statement of probable cause shows why the search should occur, while the particular description of the thing to be seized imposes limits on the extent of the search. Probable cause opens the door for the officers, and particularization tells them when to leave. The distinction between the functions of two separate requirements should not be obscured by using the statement of probable cause to describe the type of communication to be seized.
>
> Citation of the statute or a general description of the offense under investigation provides a similarly imprecise limitation on the scope of the search. Like the statement of probable cause, such citation or description is ore in the nature of a justification for the surveillance than a control on excesses. Although it may tell the officers what they are looking for, it does so in the broadest terms, resembling the general warrants which were used prior to Fourth Amendment. Thus, describing the type of communication by merely referring to the offense being investigated in either generic or

> statutory terms would not seem to provide the specific instruction and limitation demanded by the Fourth Amendment. Carr, 4-40, 41 [citations omitted]

The failure to meet statutory requirements identifying a particular "type of communication" is no mere technical defect. It is the particularity of the order which is to define the scope and nature of the executing agents' intrusions on the subjects' privacy. The lack of any particular direction in the warrant in effect hands the agents a "roving commission," and leaves them without meaningful limitation on their authority to search into the most private corners of their subjects' affairs.

Moreover, the lack of particular description of the type of communication which may be seized makes it virtually impossible to monitor compliance with the court's order, since there are not guidelines in the order against which that compliance may be measured.

Furthermore, as Professor Carr notes, the failure to adequately particularize the type of conversations to be intercepted undercuts the protections which are sought to be afforded by the requirement of §2518(5) that each order shall require that the interception "be conducted in such a way as to minimize the interception of communications not otherwise subject to interception":

> The need for a reasonably precise description is also underscored by the relationship between the particularity and minimization requirements. And the insufficiently particular description precludes effective minimization because of the lack of effective instruction as to what may be lawfully intercepted. Carr, 4-38 [citations omitted].

In the case at bar, the fact that the order defined the scope of the interception only by reference to statutory language also introduced a degree of imprecision which fatally flaws it under the most rudimentary analysis of the constitutional requirement of "particularity."

The principal thrust of the affidavit which was submitted in support of the application was that the affiant and his brother agents believed that Petitioner Vito Giacalone and his associates were establishing and operating a wholesale produce business through threats and intimidation. Unquestionably, such an activity, if proven, would constitute "the obstruction, delay or interference with commerce by threats, violence and extortion," alleged in the application, and clearly be in violation of 18 USC §1951. The use of the facilities of interstate commerce to further such an enterprise would similarly constitute a violation of 18 USC §1952, insofar as §1952(b)(2) defines the sort of "unlawful activity" which is covered by that statute as including "extortion . . . in violation of the laws . . . of the United States."

However, §1952(b)(1) also defines "unlawful activity" to include "any business enterprise involving gambling, liquor . . . narcotics . . . or prostitution." The order, it will be recalled, in allowing the agents to intercept communications relating to the suspected violation of §1952 does not merely authorize the interception of communications in aid of the "unlawful activity" of extortion, but permits interceptions of communications "concerning" the use of "a facility including the mail *in aid of a racketeering enterprise*" in violation of §1952. Thus, it is unclear whether the order purports to authorize the agents to intercept communications regarding extortion only, or communications which may have some arguable relevance to gambling, liquor law violations, prostitution and controlled substances, all of which are covered within the "racketeering activity" or "unlawful activity" defined in §1952(b).

If the affidavit (which was incorporated by reference in the application, which was in turn incorporated by reference by the order) had contained no allegations regarding anything other than the alleged extortion of customers and the supposed attempt to "muscle in on" the produce business, the question posed might be an academic one. However, the affidavit, while not even approaching any showing of probable cause as to anything other than such activities, went far beyond these allegations in discuss-

ing the supposed activities of Petitioner Vito Giacalone and his associates. For example, at page 5 of the affidavit, the affiant repeats the unsubstantiated allegation of an informant to the effect that Vito Giacalone is a "street boss" for "the organized crime syndicate," and that he manages a "large scale criminal enterprise in the Detroit area involving illegal gambling and loan sharking." At page 22, it is alleged that another informant had told the FBI that he had learned from unnamed individuals that "Vito Giacalone is controlling and conducting daily operations pertaining to illegal activities such as numbers, bookmaking, and loan collections; both from fixed card games and Las Vegas markers. . . ."

The question thus emerges: did Judge Taylor intend (or did the agents believe) that this electronic surveillance was an investigation of all of these supposed activities, and that her order envisioned the interception of communications regarding all of these activities? If it did, the direction went far beyond any showing of probable cause in the affidavit upon which the order was predicated. The fact that the order is thus tied only to the general language of the Travel Act in effect made of the order a general warrant and insured that the agents executing it would be bereft of any meaningful limitations as to what they were to seek — precisely the evil which is condemned by the Fourth Amendment's prohibition against "general warrants."

Either on its face, or even in conjunction with the allegations of the affidavit, the July 28, 1982 order may be read as authorizing an electronic search for evidence not only of the produce-based extortion, but also for evidence of gambling, loan-sharking, or, presumably extortionate collection of gambling debts — or even more. Without more, the fact that the order upon its face did not make clear the nature of the search which it authorized is sufficient to render it defective.

Of course, had the application and order satisfied the statutory command to "particularly describe the type of communications to be sought," any potential ambiguity as to the scope of the authorized search would have been eliminated. It would not have

been difficult to formulate such descriptions, either, so long as the agents (and the Court) actually knew what they were looking for, or looking into. The order could, for example, have described the type of conversations as relating to the acquisition of accounts, the collection of debts, or similarly phrased (but reasonably and fairly broad) categories of the kinds of conversations that might have constituted evidence of the offenses which the agents claimed to be investigating. Clearly this is what the statute calls for and contemplates, and the orders in the present case are an apt illustration of why such limitations are necessary in order to avoid transforming what is supposed to be a highly particularized command into a "general warrant."

III

UNDER ANY PROPER STANDARD, PETITIONERS MADE A SUFFICIENT INITIAL SHOWING TO REQUIRE A HEARING TO BE HELD ON THEIR CLAIM THAT THE "MINIMIZATION" PROVISIONS OF THE ELECTRONIC SURVEILLANCE ORDER WERE VIOLATED, AND THE COURTS BELOW SHOULD HAVE ORDERED SUCH A HEARING

Section 2518(5) provides that every order for surveillance "shall contain a provision that [it] . . . shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception. . . ." Section 2518 contains more than Congress' mandate; it also reflects the Constitution. In *Andersen v. Maryland*, 427 U.S. 463, 482 n.11 (1976), Justice Blackman, writing for the majority, observed:

> [T]here are grave dangers inherent in executing a warrant authorizing a search and seizure of a person's papers. . . . Similar dangers, of course, are present in executing a warrant for the "seizure" of telephone conversations. In *both* kinds of searches, responsible officials, including *judicial officials*, must take care to assure that they are conducted in a manner that *minimizes* unwarranted intrusions upon privacy.

(emphasis added).

Similarly, the National Wiretap Commission observed:

> [A]ny surveillance order can only authorize interception of specific statements relating to a crime under investigation and specified in the order. Such particularization of the thing to be seized by the electronic search is required by the Fourth Amendment and Section 2518(4)(c). . . . If the electronic surveillance is not to become a general search of the speakers' conversation and thereby unconstitutional because not limited to the particular item whose seizure is authorized, the executing officers *must* take steps to avoid intercepting such nonpertinent material.

Wiretap Report at 92 (emphasis added).

The leading decision on minimization under Title III is *Scott v. United States,* 436 U.S. 128 (1978), in which this Court mandated an objective analysis of the officer's conduct that would turn on "an assessment of the officer's actions in light of the facts and circumstances confronting him. . . ." 436 U.S. at 136. As the National Wiretape Commission stated:

> [T]here is no hard and fast formula for minimization[,] and . . . the requirement is satisfied if the Court on review of the government's procedures, concludes, in light of all facts and circumstances of the case that on the whole the agents have shown a high regard for the right of privacy and have done all they reasonably could to avoid unnecessary intrusions.

Wiretap Report at 14. The Commission also noted the difficulty of minimization "in the use of bugs." *Id.*

Generally, a motion to suppress surveillance is treated like a motion to suppress "other kinds of evidence." *United States v. Losing,* 539 F.2d 1174, 1177 (8th Cir. 1976). While the defendant must file papers requesting a hearing that are "sufficiently definite . . . to enable the Court to conclude that contested issues of fact" are present, less is required on the issue of minimization, since the government is "in the exclusive possession of the information by which the allegations . . . [may be] made more specific." *Id.* at 1177, 1180; *accord, United States v. Cantu,* 625 F. Supp. 656, 661, 675-77 (N.D. Fla. 1985) (defendant's showing to obtain hearing on surveillance must be "less vigorously applied" where, as in minimization, the government "absent substantial discovery" is "often in exclusive possession of information"), *aff'd,* 791 F.2d 940 (11th Cir. 1986). Consistent with the general approach to other execution issues, the government, not the suspect, has the burden to establish that its constitutional and statutory duties of minimization were met. *See, e.g., United States v. Rizzo,* 491 F.2d 215, 217 n.7 (2nd Cir.), *cert. denied,* 416 U.S. 990 (1974); *Carr* § 6.2(d)(2) at 6-60 (collecting cases from the 2nd, 3rd, 7th and 8th Circuits); *see generally La Fave,* § 11.2 (a) (making motion), (b) (burden of proof). The government must, in short, be required "to divulge in some manner how the

monitoring was executed." *Losing*, 539 F.2d at 1181 (examination of progress reports suggested).

Petitioners filed a motion for a hearing on the minimization issue in connection with the Title III Order of July 28, 1982, which mandated general minimization, but required, in particular, "[p]hysical surveillance and voice identification ... at all times when conversations take place outside the business...." (Order of July 28, 1982 p. 5.)

In their papers requesting a hearing, Petitioners specifically questioned (1) the sufficiency of the "spot checks" on the bugs (listening without predetermining that the suspects were present), (2) over-long listening to conversations, (3) the sparse use of physical surveillance (six days in August and none thereafter), (4) a video camera that extensively used was, but purportedly produced only three days of tapes during eighteen days of surveillance in August, and (5) the sharp shift in the agents' listening pattern (away from "extortion" toward other offenses (gambling), for which the agents did not have probable cause to surveil, when they sought the order, but concerning which they apparently expected to overhear conversations). (R. 114: Suppression Memorandum of January 6, 1987, at 13-19.) In particular, the shift in the listening pattern specifically raised "plain view" issues under *Coolidge v. New Hampshire*, 403 U.S. 443, 464-72 (1971) and Section 2517(5). *See* S. Rep. No. 1097, 90th Cong., 2nd Sess. 100 (1969)("lawfully obtained [order] ... sought in good faith and not as subterfuge search and ... incidental ... intercept[ion]"); *United States v. Sanchez*, 509 F.2d 886, 890 (6th Cir. 1975) (search for explosives on narcotics warrant illegal); *Goldsmith* at 141-50 (discussion of plain view seizures under Title III).[10]

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[10] In *Coolidge*, Justice Stewart, for a plurality, set out the constitutional requirements of "plain view" seizures: (1) initial valid intrusion (2) immediate recognition of character of item to be seized, and (3) inadvertent discovery. 403 U.S. at 466-69. Lower courts have faithfully followed these three requirements. *La Fave* § 7.5(d) at 138-39. In *Texas v. Brown*, 460 U.S. 730, 743-44 (1983), however, a different plurality questioned the constitutional basis of the inadvertency requirement. *See Donta v. Hooper*, 774 F.2d 716, 719 (6th Cir. 1985)

Petitioners also moved for the production of the progress reports and the applications and orders of approval entered under 18 U.S.C. §2517(5). (R. 94: Motion for Production of Progress Reports, etc. of September 3, 1986; R. 122: Motion for Production of Section 2517(5) Order of January 5, 1986.) The progress reports were sought to review the agents' compliance with minimization and plain view, *United States v. Quintana*, 508 F.2d 867, 875 (7th Cir. 1975), and to review the appropriateness of continued surveillance, S. Rep. No. 1097, 90th Cong., 2nd Sess. 104 (1969) ("check on continuing need" "not unthinkingly or automatically continued"); *United States v. James*, 494 F.2d 1007, 1021 (D.C. Cir.), *cert. denied sub nom. Jackson v. United States*, 419 U.S. 1020 (1974). The Section 2517(5) orders and applications were sought to review the "plain view" aspects of the surveillance. *United States v. McKinnon*, 721 F.2d 19, 22 (1st Cir. 1983) (to protect against subterfuge searches); *Sanchez*, 509 F.2d at 890. They expressed particular concern with the obvious fact that the "expected" conversations of extortion relating to the produce business were not overheard, but that gambling-related conversations had been intercepted. Under *Sanchez*, 509 F.2d at 890, such facts were highly suspicious. At the District Court's request, Petitioners also submitted a supplemental, eight-page "offer of proof," illustrative of what a minimization hearing might show. (R. 281: Supplement to Motion to Suppress Re Minimization of June 2, 1987.)

The government opposed the motion to conduct a hearing on minimization and also opposed the production of the progress reports and the Section 2517(5) orders and applications.[11] In-

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(*Brown* may have modified *Coolidge*), *cert. denied*, 107 S. Ct. 3261 (1987). Nonetheless, it — along with good faith, i.e. the absence of subterfuge — remains the rule under Title III by virtue of Section 2517(5).

[11] If the government wants to use complex investigative tools, such as Title III, it must not object to the allocation of the resources necessary to test their lawfulness. *Compare Cohens v. Virginia*, 19 U.S. (6 Wheat) 264, 377 (1821) (Marshall, C.J.) ("[H]e who demands decision without permitting inquiry, affirms that the decision he asks does not depend on inquiry."), *with Escoe v. Zerbst*, 295 U.S. 490, 494 (1935) (Cardozo, J.) ("The judge is without the light

deed, the government's counsel argued that there was "no need" or "good reason" to produce either the progress reports or the Section 2517(5) orders and applications and suggested that a sufficient preliminary showing for a hearing on minimization had not been made. (R. 104: Government's Memorandum of February 17, 1987, at 4 (no good reason), 6 (no need).) Incredibly, he also used the progress reports and the Section 2517(5) orders and applications without disclosing them to argue that no confusion existed in the minds of the District Court or the agents on the scope of the surveillance. (R. 209: Government's Memorandum of February 18, 1987, at 9-10.)

The District Court agreed with the government. Nevertheless, it did make an *in camera* examination of the progress reports and Section 2517(5) orders and applications.[12] It found that they were "proper in all material respects and that no information contained (in them) would be of any material assistance to the defense." (R. 276: Opinion of June 5, 1987 at 2.) The District Court also found that an insufficient showing had been made to justify a minimization hearing (R. 283: Opinion of June 10, 1987, at 2.), and the Sixth Circuit upheld this ruling.

The result of these decisions may be fairly termed "Kafkaesque."[13] The government alone possessed the key evi-

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whereby his discretion must be guided until a hearing, however summary, has been given the supposed offender.")

[12] By examining the reports, orders and applications, the Court at least recognized that the documents merited review in the face of Defendants' extensive offer of proof. Its decision to do so *in camera*, however, is not easily justified. Unlike the issues presented by Defendants' motion to identify informants, the motion to produce the progress reports and Section 2517(5) orders and applications could engender no overriding concerns with informant safety.

[13] *See* F. Kafka, *The Trial* 115-16 (1956):

> It was all very regrettable, but not wholly without justification. K. must remember that the proceedings were not public; they could certainly, if the Court considered it necessary, become public, but the Law did not prescribe that they must be made public. . . . In such circumstances the Defense was naturally in a very ticklish and difficult position. Yet that, too, was intentional. For the Defense was not actually countenanced by the Law, but only tolerated, and there were differences of opinion even on

dence, particularly the monitoring agents' testimony on what and why they acted as they did in conducting their surreptitious surveillance. "There is a direct relationship between particularity and the minimization requirements; as anything not pertinent to the particularized conversations must be minimized, broader designations afford law enforcement greater leeway." *Goldsmith* at 138. In addition, in "the context of electronic surveillance [the] 'initial valid intrusion limitation' [of the plain view doctrine]" require[s] "compliance with the minimization requirement." *Id.* at 146.

Here, the agents had, of course, obtained from the District Court the most general of designations for the objective of the surveillance: "Extortion-related conversations." It is evident, too, that they surreptitiously obtained more than they had probable cause to listen for when they sought the Title III Order. *See Sanchez,* 509 F.2d at 890. No matter how the issue was conceptualized — one of particularity, minimization, or statutory plain view — the validity of these additional interceptions went to the very heart of the government's case.

Nevertheless, the government resolutely used, on the particularity issue, the progress reports and the Section 2517(5) orders and applications that were made and granted *ex parte,* but then saw "no need" or "good reason" to disclose them to the suspects for any purpose. At least since the time of *Queen Caroline's Case,* 129 Eng. Rep. 976 (1820), however, one who would use a document to his advantage must show it to his opponent. *See, e.g.,* Fed. R. Evid. 613(a) (show to counsel); 1002 (production of original if contents to be proven).

The government also bore the burdens of production and persuasion concerning its compliance with its constitutional and statutory duty of minimization. Yet it merely asserted in argument that it had done no wrong, and it steadfastly refused to

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that point, whether the Law could be interpreted to admit such tolerance at all. Strictly speaking, therefore, none of the counsels for the Defense was recognized by the Court, all who appeared before the Court as counsels being in reality merely in the position of pettifogging lawyers.

justify its conduct further by producing the critical live testimony, the progress reports, or any other evidence. *But see Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 255 n.9 (1981) (a party "cannot meet his burden merely . . . by argument of counsel."). Thus, the Petitioners here, too, faced a classic "Catch-22" dilemma. While theoretically the government had to justify its invasion of his privacy, the Defendants had to come up with enough proof of its illegality to make the government fulfill its obligation. But the government was in sole possession of key evidence on that illegality (the live testimony, progress reports, etc.), and it fought strenuously to vouchsafe its confidentiality. *But see United States v. Andolschek,* 142 F.2d 503, 506 (2nd Cir. 1944) (Hand, J.) ("The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully.").

The decisions below fail to even acknowledge, much less attempt to resolve such conflicts, and bespeak a need for further direction from this Court. It is difficult to imagine how anyone in the position of the Petitioners could have made a more detailed initial showing of the appropriateness of an evidentiary hearing to determine compliance with the minimization requirements under the standard established by *Scott,* and this Court should grant certiorari in this case not only to ensure that they have the hearing that they are due, but also to lay down clear and explicit standards for the review of similar claims in other cases.

CONCLUSION

The provisions of Title III represent a carefully drawn compromise between competing interests, and rely for their effectiveness on a high level of judicial scrutiny. Only by abdicating the obligations placed upon them by that statutory scheme could the courts below have given such short shrift to Petitioners' claims, and the treatment given those claims demonstrates a need for this Court not only to vindicate those claims, but also to articulate meaningful guidelines for the resolution of similar claims.

This Court should grant certiorari and vacate the decision of the Sixth Circuit Court of Appeals. If it does not order suppression of the electronic surveillance evidence because of the insufficiency of the initial Order's description of the communications to be intercepted, it should at the very least order the holding of meaningful evidentiary hearings on the *Franks* and "minimization" issues.

Respectfully submitted,

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No.

IN THE SUPREME COURT OF THE UNITED STATES

VITO GIACALONE,
MARIO AGOSTA,
ALBERT HADY,
JACK V. GIACALONE,
ANTHONY D. GIACALONE,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

APPENDIX

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Appendix
Court Opinion

Nos. 87-1924, 87-1931/1932/1933/1934

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

VITO GIACALONE (87-1924),
MARIO AGOSTA (87-1931),
ALBERT HADY (87-1932),
JACK V. GIACALONE (87-1933),
ANTHONY D. GIACALONE (87-1934),
Defendants-Appellants.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed August 5, 1988

Before: MILBURN, GUY, and NORRIS, Circuit Judges.

GUY, Circuit Judge. Defendants, Vito Giacalone, Jack Giacalone, Albert Hady, and Mario Agosta, appeal their convictions for conspiring to participate in the affairs of a criminal enterprise formed for the purpose of collecting illegal gambling debts, in violation of the Racketeer Influenced Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(d). Defendant Anthony Giacalone appeals his conviction for conducting an illegal gambling business, in violation of 18

U.S.C. § 1955. Each of the defendants received prison sentences ranging from one to five years. The defendants initially entered pleas of "not guilty." However, after the district court denied two of their pretrial motions, the defendants entered conditional guilty pleas pursuant to Fed. R. Crim. P. 11(a)(2), thereby reserving a right to appeal from the convictions and the pretrial rulings.

All of the issues raised on appeal relate to the government's collection and use of information obtained by means of electronic surveillance. Specifically, defendants contend that the district court erred by refusing to conduct an *in camera* hearing in order to examine the informants whose allegations were used to support the application for a wiretap.

Defendants also allege on appeal, as they did below, that the warrants authorizing the wiretaps violated four specific statutory requirements set forth in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-20 (Title III): (1) inadequate showing of probable cause; (2) insufficient showing of the unfeasibility of alternative investigatory techniques; (3) lack of particularity; and (4) failure to minimize the extent of the scope of the electronic surveillance.

For the following reasons, the defendants' convictions are affirmed.

I.

On July 28, 1982, the government submitted an application to Judge Anna Diggs-Taylor, United States District Judge for the Eastern District of Michigan, for an order authorizing a wiretap pursuant to Title III. The application sought authorization for the interception of oral and wire communications made at the business premises of Farm Fresh Produce, Inc., a wholesale produce company in Detroit, Michigan. In the application, the government alleged that several named individuals were involved in an extortion-

ate scheme to interfere with commerce by using threats of violence to compel customers to purchase produce from Farm Fresh, in violation of 18 U.S.C. §§ 1951 and 1952. In support of its application, the government submitted a forty-two page affidavit from Special Agent Brian K. Rossi of the Federal Bureau of Investigation. The information contained in Agent Rossi's affidavit was obtained primarily from confidential informants who claimed to have personally observed the alleged acts of intimidation, or to have overheard conversations relating to the extortionate activities. Agent Rossi stated in the affidavit that the informants were unwilling to testify even if they were granted immunity and placed in protective custody. According to Agent Rossi, alternative investigative procedures—such as physical surveillance, infiltration of the Farm Fresh business organization, or obtaining a search warrant—were considered and rejected as unlikely to succeed or too dangerous. Moreover, Rossi stated that interviews with the extortion victims would "alert the suspects to the pending investigation and would thereby cause them to alter their modus operandi thereby frustrating the investigation."

On July 28, 1982, Judge Taylor issued an order authorizing the government to intercept oral communications at the premises of Farm Fresh Produce and the surrounding area. Judge Taylor also issued a Title III order authorizing electronic surveillance of four telephones located on the premises.

During the course of the first thirty-day period of authorized surveillance, the government was unable to obtain any information relating to the alleged extortionate scheme. The government did, however, uncover evidence of other federal crimes, including gambling. Judge Taylor was kept informed of these developments through progress reports and, based on the evidence obtained during the first thirty-day period, Judge Taylor granted the government's application for a thirty-day extension of the Title III order. Additional extensions

were granted until the surveillance terminated on December 3, 1982.

On June 5, 1986, a grand jury returned a three-count indictment against the defendants. Count I of the indictment charged defendants with conspiracy to engage in a racketeering enterprise in violation of RICO, 18 U.S.C. § 1962(d). Count II charged defendants with conducting an illegal gambling business in violation of 18 U.S.C. § 1955, and of aiding and abetting each other in violation of 18 U.S.C. § 2(a). Finally, in Count III, defendants were charged with conspiracy under 18 U.S.C. § 371. The defendants pled not guilty.

On January 6, 1987, the defendants filed two motions to suppress evidence. In the first motion, defendants alleged that some of the allegations contained in the original Title III application were false. In support of their challenge to the factual accuracy of the application, the defendants submitted affidavits of their own and from some of the alleged extortion victims denying the alleged incidents of threats and intimidation. The motion concluded with the following request for relief:

> Wherefore, defendants respectfully pray that this Honorable Court enter an order for an in-camera examination of the informants, for an evidentiary hearing, and upon conclusion of said evidentiary hearing, an order suppressing from evidence all Title III interceptions.

A second motion entitled "Motion to Suppress Fruits of Electronic Surveillance" was also filed on January 6, 1987. In the second motion, defendants challenged not only the original authorization order of July 28, 1982, but also the subsequent extensions granted by Judge Taylor on August 30, 1982, October 1, 1982, and November 5, 1982. The motion set forth four alleged violations of the statutory requirements of Title III. The second motion also contained

a request for an evidentiary hearing on the minimization issue.

On May 15, 1987, the trial judge, Judge Suhrheinrich, conducted an *in camera* examination of the affiant, Special Agent Brian K. Rossi of the Federal Bureau of Investigation. Judge Suhrheinrich also interiewed four other FBI agents who had worked with the informants involved in the case. The judge did not examine the informants themselves. Assistant United States Attorney Walter Kozar was also present and assisted in the examinations. None of the defense attorneys were allowed to participate in the hearing.

Following the *in camera* examination of the FBI agents, Judge Suhrheinrich issued an order denying defendants' motion for an *in camera* examination of the informants and for an adversarial evidentiary hearing on the issue of the affiant's veracity. In the memorandum opinion and order dated May 27, 1987, Judge Suhrheinrich stated:

> After a thorough and careful examination of Agent Rossi and his affidavit, the Court finds no evidence to suggest Agent Rossi included a false statement in the government's affidavit. Furthermore, there is no reason to believe Agent Rossi acted in reckless disregard for the truth. The Court has no doubt as to Agent Rossi's veracity or the truthfulness of the allegations contained in his affidavit.

Accordingly, the court concluded that defendants were not entitled to an evidentiary hearing under *Franks v. Delaware*, 438 U.S. 154 (1979), because they had failed to make a "substantial preliminary showing" that Agent Rossi had made a false statement in his affidavit, either knowingly or with reckless disregard for the truth.

On June 2, 1987, Judge Suhrheinrich issued an opinion and order denying defendants' motion to suppress the fruits of the electronic surveillance. Judge Suhrheinrich rejected

defendants' arguments relating to particularity, necessity, and probable cause. The court, however, allowed the defendants an opportunity to present additional evidence regarding the issue of minimization. On June 10, 1987, Judge Suhrheinrich issued an order finding that the government had properly restricted the scope of its surveillance to the interceptions authorized under the warrants and permissible "spot checks." Consequently, defendants' suppression motion was denied and, later that same day, on June 10, 1987, defendants entered conditional guilty pleas pursuant to Fed. R. Crim. P. 11(a)(2). This appeal followed.

II.

A.

The first issue raised on appeal by defendants concerns the district court's denial of their motion for an *in camera* examination of the informants whose allegations supplied the probable cause for issuing the Title III order of July 28, 1982. The defendants' original motion also contained a request for an adversarial evidentiary hearing to determine the veracity of the government affiant, Agent Rossi. Attached to their motion were several affidavits from defendants and others contradicting allegations which appeared in Agent Rossi's affidavit. Defendants claimed that their affidavits showed that either the informants lied to Special Agent Rossi or that he lied in his affidavit. In their motion before the district court, defendants admitted that "it is impossible for Defendants to make the 'substantial preliminary showing' that the affiant or his fellow agents, as opposed to the informants, provided the false statements in order to merit an evidentiary hearing" under *Franks v. Delaware*, 438 U.S. 154 (1979).

On appeal, defendants apparently concede, as they did in their pretrial motion, that they are not entitled to a "fullblown" *Franks* hearing until they make a "substantial preliminary showing" that the government affiant (in this

case Agent Rossi) lied in his affidavit, as opposed to showing that the informants lied to Agent Rossi. Nevertheless, defendants contend that it was a "manifest abuse of discretion" for the district court not to examine the *informants* as well as Agent Rossi in order to determine who was telling the truth. We disagree.

In *Franks v. Delaware*, the Supreme Court held:

> [W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

438 U.S. at 155-56. In *Franks*, the defendant challenged his rape conviction on fourth amendment grounds arguing that the police had deliberately lied in the affidavit used to procure a warrant to search his apartment. In the affidavit, the police officers stated that they had contacted the defendant's employers who had told the officers that defendant's normal attire matched the description given by the rape victim. The search of the apartment revealed similar articles of clothing and a knife similar to the one used in the assault. Subsequently, the defendant's attorney requested an evidentiary hearing to allow the defendant's employers to testify that neither one of them had spoken to the police officers who had

signed the affidavit and that their stories were "somewhat different" from the information recited in the affidavit. The trial court refused to grant a hearing and the defendant's conviction was affirmed by the Supreme Court of Delaware.

The United States Supreme Court granted certiorari to determine whether a criminal defendant ever has the right to challenge the truthfulness of factual statements made in an affidavit supporting a warrant. The Court noted several legitimate arguments both in favor and against requiring an evidentiary hearing to test the veracity of a warrant application. After weighing the competing interests, the Court concluded that an evidentiary hearing is constitutionally required where the defendant makes "allegations of deliberate falsehood or of reckless disregard for the truth" and the allegations are substantiated by an offer of proof. 438 U.S. at 171. The Court emphasized that "[t]he deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant." *Id.*

In the instant case, the affidavits submitted by the defendants themselves and by some of the alleged victims contradict allegations made by the FBI informants which were repeated by Agent Rossi in the warrant affidavit. Unlike *Franks*, the *informants* in this case do not dispute the allegations made in the affidavit based on their statements to the FBI. It is not enough for defendants to show that the affidavit contains false information; in order to obtain a *Franks* hearing, defendants must make a "substantial preliminary showing" that the false statements originated with the government affiant, not with the informants, or that the government affiant repeated the stories of the affiant with reckless indifference to the truth. In this case, it is clear that the defendants are not entitled to a *Franks* hearing based on the affidavits submitted by them since those statements do not necessarily call into question the veracity of the *affiant*. Given the absence of any showing that Rossi made false statements in

the affidavit, the district court properly concluded that a *Franks* evidentiary hearing was not warranted. *See United States v. Bloomgren*, 814 F.2d 580, 583-84 (10th Cir. 1987); *United States v. Barrientos*, 758 F.2d 1152, 1159 (7th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986); *United States v. Southard*, 700 F.2d 1, 10 (1st Cir.), *cert. denied sub nom. Ferris v. United States*, 464 U.S. 823 (1983).

Defendants apparently concede this point. Nevertheless, they argue that they are faced with what they describe as a "Catch 22" situation, i.e., they have evidence that either the informants or Agent Rossi lied, but they cannot prove it was Agent Rossi without first interviewing the informants, or at least having the district court interview the informants *in camera*. Therefore, defendants contend that the court was obligated to interview *both* Rossi *and* the informants *in camera* and that it was a "clear abuse of discretion" to only examine Agent Rossi.

We hold that the district court did not abuse its discretion by choosing to examine only the affiant and the other FBI agents *in camera* and not the informants. We decline defendants' invitation to extend the reasoning of the *Franks* decision to mandate a preliminary *in camera* examination of both the affiant and the informants in cases where the defendants allege that the affidavit contains false information. In *Franks*, the Court was primarily concerned with the credibility of the *affiant*, not the informants. The *Franks* Court observed that the fourth amendment does *not* require "that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information within the affiant's own knowledge that sometimes may be garnered hastily." 438 U.S. at 165. Rather, the *Franks* Court simply held that the government affiant must reasonably believe the allegations to be true. *Id.* Thus, in *Franks*, the Court distinguished its previous opinion in *Rugendorf v. United States*, 376 U.S. 528 (1964). In *Rugendorf*, the Court held that:

> [N]o Fourth Amendment question was presented when the claimed misstatements in the search warrant affidavit "were of only peripheral relevancy to the showing of probable cause, *and,* not being within the personal knowledge of the affiant, did not go to the integrity of the affidavit." 376 U.S., at 532 (emphasis added). *Rugendorf* emphasized that the "erroneous statements ... were not those of the affiant" and thus "fail[ed] to show that the affiant was in bad faith or that he made any misrepresentations to the Commissioner in securing the warrant." *Id.*, at 533.

Franks, 438 U.S. at 163 (citing *Rugendorf,* 376 U.S. at 532-33).

In the instant case, Judge Suhrheinrich took it upon himself to examine Agent Rossi *in camera.* In describing the examination, Judge Suhrheinrich stated:

> During the examination, the Court questioned Agent Rossi about the facts supporting the allegations contained in the affidavit. The Court inquired into how and from whom Agent Rossi obtained the information in the affidavit. Agent Rossi was questioned on the veracity of the informants who provided the government with information which was included in the affidavit. The Court reviewed the conditions under which the informant based information was given to Agent Rossi and the precautions taken to assure the information was reliable. Additionally, the Court examined Agent Rossi's background and extent of involvement in the case.

Based on this examination, Judge Suhrheinrich concluded that Agent Rossi did not intentionally lie or act in reckless disregard of the truth.

The transcript of the *in camera* examination conducted by Judge Suhrheinrich has been placed under seal and thus was

unavailable to the defendants. Based on our review of that transcript, we are satisfied with the scope and the manner of the examination. The transcript reveals that Judge Suhrheinrich questioned Agent Rossi very closely regarding the allegations made in the application for the Title III authorization. The judge asked Agent Rossi specific questions regarding the reliability of the informants and the sources of their knowledge. Moreover, the judge also examined four other FBI agents regarding the accuracy and reliability of information obtained by other informants. Agent Rossi informed the judge that he had reviewed his affidavit with the other agents prior to its submission in order to ensure the accuracy of the allegations. We find that the extensive examination conducted by Judge Suhrheinrich was more than adequate to establish the veracity of the affiant, Agent Rossi.

On appeal, defendants do not suggest that Judge Suhrheinrich's factual finding with regard to Agent Rossi's credibility is clearly erroneous. Instead, defendants contend that the district judge could not adequately assess Agent Rossi's veracity without also interviewing the informants. We find nothing in *Franks* which suggests that *in camera* examinations of both informants and affiants are Constitutionally required in order to help establish the "substantial preliminary showing" necessary to invoke a *Franks* evidentiary hearing.

Defendants quote from a passage in *Franks* wherein the Court states:

> And because we are faced today with only the question of the integrity of the affiant's representations as to his own activities, we need not decide, and we in no way predetermine, the difficult question whether a reviewing court must ever require the revelation of the identity of an informant once a substantial preliminary showing of falsity has been made.

438 U.S. at 170. We note that the Court is referring to a situation which exists *after* a substantial preliminary showing has been made. The Court explained that "[t]he requirement of a substantial preliminary showing" is intended "to prevent the misuse of a veracity hearing for the purposes of discovery and obstruction." *Id.* In the instant case, the affidavits submitted by defendants do not amount to a "substantiated preliminary showing" that Agent Rossi's statements were false; therefore, there is no need to consider whether the informants' identities should be revealed to defendants for purposes of a *Franks* evidentiary hearing.

In sum, we find that the district court did not abuse its discretion by declining to examine the informants *in camera* in addition to the government's affiant. Under *Franks*, suppression is required only when the *affiant* deliberately lied or testified in reckless disregard of the truth. The procedure followed by the district court in this case struck a fair balance between defendants' interests in excluding evidence secured by means of a false affidavit and the government's interest in preserving the confidentiality of its informants. Similar procedures have been approved by other federal courts. *See, e.g., United States* v. *Kiser*, 716 F.2d 1268, 1270-74 (9th Cir. 1983); *United States v. Southard*, 700 F.2d 1, 10-11 (1st Cir. 1983); *United States v. Arrington*, 618 F.2d 1119, 1125-26 (5th Cir. 1980), *cert. denied*, 449 U.S. 1086 (1981). *Cf. United States v. Bloomgren*, 814 F.2d 580, 582-84 (10th Cir. 1987); *United States v. Barone*, 787 F.2d 811, 814 (2d Cir. 1986). *See also United States v. Missouri*, 644 F. Supp. 108, 112-13 (E.D. Mich. 1986).

Accordingly, we find that the district court did not err in denying defendants' motion for an *in camera* examination of the confidential informants.[1]

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[1]Our holding is not meant to imply that the type of *in camera* examination of the affiant conducted by Judge Suhrheinrich is Constitution-

B.

We now consider defendants' claims of error as they relate to the statutory requirements of Title III.

1. Probable Cause

In the instant case, defendants argue that the facts alleged in the warrant application and the accompanying affidavit were not sufficient to establish probable cause to believe that the defendants would use the telephone system to further their alleged extortionate scheme or that the extortionate activities would occur at the site of defendants' business.

Prior to authorizing the use of electronic surveillance under Title III, the issuing judge must determine whether the facts alleged in the application create probable cause to believe that: (1) an individual has committed, is committing, or is about to commit the offense charged; (2) communications concerning the offense will be obtained through the requested surveillance; and (3) the location of the electronic surveillance has been used, is being used, or will be used in the commission of the offense, or is leased to, listed in the name of, or commonly used by the individual suspected of the offense. *See* 18 U.S.C. § 2518(3)(a), (b), and (d).[2]

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ally required. We do not attempt to describe the exact parameters which would govern such a hearing. Nor do we decide the issue of whether such a procedure is even necessary. Rather, we merely hold that the defendants' fourth amendment rights were not violated by the court's refusal to interview the informants *in camera* along with the affiant. We believe that the trial judge should retain the discretion to determine what type of hearing is necessary, if any, to determine the veracity of the affiant in cases where the defendant has alleged that the affidavit contains false information, but has failed to make a "substantial preliminary showing" that the *affiant* has lied such as that which would require a *Franks* hearing.

[2]Title 18 U.S.C. § 2518(3) provides in part:

In *United States v. Alfano,* 838 F.2d 158 (6th Cir. 1988), this court recently set forth the general standard used for determining the existence of probable cause under Title III:

> [T]here is no specific formula that must be met for a warrant, and . . . evidence must be judged on the totality of the circumstances and in a reasonable and common sense manner. *Illinois v. Gates,* 462 U.S. 213, 238, 103 S. Ct. 2317, 2332, 76 L.Ed.2d 527 (1983). Under this standard, the question that must be decided in issuing a warrant is whether there is probable cause to believe that evidence of a crime will be uncovered.

Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire, oral, or electronic communications within the territorial jurisdiction of the court in which the judge is sitting (and outside that jurisdiction but within the United States in the case of a mobile interception device authorized by a Federal court within such jurisdiction), if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

. . . .

(d) except as provided in subsection (11), there is probable case for belief that the facilities from which, or the place where, the wire, oral, or electronic communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

> Obviously, certainty is not required at this stage, and the exact quantum of support required has frequently been described as "a fair probability," but more than a "mere suspicion," that such evidence will be discovered. Facts can amount to a fair probability without being proof beyond a reasonable doubt or even a *prima facie* showing. Id. at 235, 103 S. Ct. at 2330.

838 F.2d at 161-62.

The *Alfano* court also described the appropriate standard of review of Title III authorizations:

> Since the issuing judge is in the best position to determine all of the circumstances in the light in which they may appear at the time, "great deference" is normally paid to the determination of an issuing judge. "Reasonable minds frequently may differ on the question whether a particular affidavit establishes probable cause, and we have thus concluded that the preference for warrants is most appropriately effectuated by according 'great deference' to a magistrate's determination." *United States v. Leon,* 468 U.S. 897, 914, 104 S. Ct. 3405, 82 L.Ed.2d 677 (1984) (quoting *Spinelli v. United States,* 393 U.S. 410, 419, 89 S. Ct. 584, 590, 21 L.Ed.2d 637 1969)). Thus, the fact that a later trial judge or reviewing court may feel that a different conclusion was appropriate does not require, nor even authorize, the suppression of evidence gained through such a warrant. In *United States v. Lambert,* 771 F.2d 83, 93 (6th Cir.), *cert. denied,* 474 U.S. 1034, 106 S.Ct. 598, 88 L.Ed.2d 577 (1985), we held that a magistrate's determination on the question of probable cause will not be reversed if the record contains a "substantial basis for his probable cause findings."

838 F.2d at 162.

In the instant case, the warrant affidavit alleged that Vito Giacalone and Michael Polizzi were members of a criminal organization and were using intimidation and threats to force local restaurants to purchase produce from their newly-formed company, Farm Fresh Produce, Inc. The affidavit also detailed several specific examples of threats made against competitors and intimidation of customers. Based on these representations, Judge Taylor issued the Title III order on July 28, 1982.

In rejecting defendants' suppression motion, Judge Suhrheinrich stated that "Judge Taylor properly determined that probable cause existed." Judge Suhrheinrich noted that "[t]he affidavit clearly reflects the veracity of the informants, each of whom was known to have previously supplied accurate information leading to conviction in other cases." The court also noted that the informants' knowledge was obtained on a first-hand basis. Applying the totality of the circumstances test, the court concluded that "probable cause was properly determined to exist in this case despite innocent explanations which may exist for the defendants' actions."

In the instant case, defendants apparently concede that the informants' allegations were sufficient to establish probable cause to believe that offenses had been and would continue to be committed, namely extortion. Defendants, however, claim that the accusations contained in the affidavit did not support a finding of probable cause with respect to the statutory requirements of 18 U.S.C. § 2518(3)(b) and (d), i.e., the evidence did not show probable cause to believe that extortionate activity would be conducted over the telephone or that it would take place at defendants' business. In their brief, defendants point out that the alleged acts of extortion, as described by the informants, occurred in person rather than over the telephone, and that all of the threats were made at the victims' places of business rather than at Farm Fresh.

Therefore, defendants conclude that the warrant application did not meet the statutory probable cause standard. We disagree.

Given the totality of the circumstances as set forth in the warrant affidavit, we find a substantial basis in the record to support Judge Taylor's finding of probable cause. First, we emphasize that there was clearly probable cause to believe that defendants were attempting to build up the clientele of their fledgling produce business by means of extortion. Since the alleged extortionate scheme was an intrinsic part of the operation of Farm Fresh Produce, there was a fair probability that defendants would discuss this subject at the site of their offices at Farm Fresh Produce, Inc. Moreover, it is undisputed that defendants operated four telephone lines from their offices at Farm Fresh and that they regularly made purchase and sales orders and conducted other types of business over the telephone. Given the nature of the alleged scheme, there was a substantial basis of fact from which the authorizing judge could reasonably conclude that there was a fair probability that defendants would refer to their illegal activities during the course of their telephone conversations with their customers and others. Thus, reading the whole affidavit in a common sense manner, Judge Taylor could reasonably have found probable cause to believe that incriminating communications would be intercepted at the Farm Fresh premises, as required by 18 U.S.C. § 2518(3)(b), and that the telephones to be monitored were either being used in connection with the criminal activity or were commonly used by the suspects, as required by 18 U.S.C. § 2518(3)(d).

In light of the substantial basis for the probable cause findings and the "great deference" that is to be paid to the issuing judge's determination of probable cause, we find that the district court correctly denied defendants' motion for suppression based on lack of probable cause.

2. Necessity for Electronic Surveillance

In addition to the probable cause requirements contained in 18 U.S.C. § 2518(3)(a), (b), and (d), subsection (c) of section 2518(3) requires a finding by the issuing judge that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." Section 2518(1)(c) requires "a full and complete statement" to this effect in the affidavit.

Defendants argue that the government did not exhaust all feasible methods of investigation prior to applying for authorization to engage in electronic surveillance. Specifically, defendants contend that the FBI should have interviewed the alleged victims of the extortionate scheme and should have attempted to convince them to wear a "wire" in order to record the threats made by the defendants. In his affidavit, however, Agent Rossi stated that this approach was considered and rejected because it would "alert the suspects to this pending investigation and would thereby cause them to alter their modus operandi thereby frustrating the investigation."

Both Judge Taylor, in granting the initial authorization, and Judge Suhrheinrich, in rejecting defendants' motion to suppress, found that the government had adequately demonstrated the need for electronic surveillance. Judge Suhrheinrich noted that according to Agent Rossi's affidavit: (1) the informants refused to testify because of fear of reprisal; (2) attempts to infiltrate defendants' organization had been unsuccessful in the past and were thus unlikely to succeed in the future; and (3) undercover investigations would be extremely dangerous.

In *Alfano*, this court recently reiterated the standard used for assessing the adequacy of a "needs statement" in a Title III application:

> [W]iretaps are not to be used thoughtlessly or in a dragnet fashion. As our court has said, what is

> needed is to show that wiretaps are not "'being routinely employed as the initial step in criminal investigations." However, the government is not required to prove that every other conceivable method has been tried and failed or that all avenues of investigation have been exhausted.

Alfano, 838 F.2d at 163 (citations omitted). The *Alfano* court also quoted from a previous Sixth Circuit decision wherein we summarized the extent of the required showing of necessity as follows:

> All that is required is that the investigators give serious consideration to the non-wiretap techniques prior to applying for wiretap authority and that the court be informed of the reasons for the investigators' belief that such non-wiretap techniques have been or will likely be inadequate.

838 F.2d at 163-64 (quoting *United States v. Lambert*, 771 F.2d 83, 91 (6th Cir.), *cert. denied*, 474 U.S. 1034 (1985)).

Applying the foregoing standards to the facts in the instant case, it is clear that the district court correctly concluded that the statement of necessity in the warrant application was sufficient to satisfy the statutory requirements of 18 U.S.C. §§ 2518(1)(c) and 2518(3)(c).

3. Particularity

Defendants' next claim of error focuses on the statutory requirements embodied in 18 U.S.C. § 2518(1)(b) which states:

> (b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) except as provided in subsection (11), a particular

> description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted.

Defendants contend that subsections (b)(i) and (iii) were not met by the government's application and the accompanying affidavit.

In addition, defendants argue that the order issued by Judge Taylor did not meet the requirements of 18 U.S.C. § 2518(4)(c). That section requires the inclusion of "a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates" in the interception order. Defendants claim that neither the government's application nor Judge Taylor's order were sufficiently particular as to the type of communication and the particular offense involved.

Defendants contend that the government's application and the court's order were deficient in that they describe the communications to be intercepted in terms of the particular offenses which the government suspects are being, or are about to be, committed. The defendants suggest that such a method of describing the communications was not sufficiently particular because it did not limit the scope of the electronic surveillance intrusions. Instead, defendants claim that the authorization order should have specifically limited the scope of the surveillance to "extortion-related activities in the operation of their produce business in securing additional customers."

We do not find this degree of specificity necessary. Several courts have upheld Title III authorizations in which the communication to be intercepted was described in terms of the suspected offense. *See, e.g., United States v. Licavoli,* 604 F.2d

613 (9th Cir. 1979), *cert. denied*, 446 U.S. 935 (1980); *United States v. Cohen*, 530 F.2d 43 (5th Cir.), *cert. denied*, 429 U.S. 855 (1976); *United States v. Tortorello*, 480 F.2d 764 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973). As stated by the *Tortorello* court:

> These decisions demonstrate that a pragmatic approach has been taken with respect to the particularity requirement. A specific crime or a specific series of related crimes must be identified. Although the nature and type of the anticipated conversations must be described, the actual content need not and cannot be stated since the conversations have not yet taken place at the time the application is made and it is virtually impossible for an applicant to predict exactly what will be said concerning a specific crime. *United States v. Sklaroff*, 323 F. Supp. 296, 307 (S.D. Fla. 1971). The order must be broad enough to allow interception of any statements concerning a specified pattern of crime. In determining whether the order and application are sufficiently particular, the papers as a whole must be considered, including especially those portions which recite facts intended to establish probable cause.

480 F.2d at 780. Defendants are apparently unable to cite any authority to the contrary. Accordingly, we find that the district court was correct in concluding that the description of the targeted communications was sufficiently specific to satisfy the requirements of 18 U.S.C. §§ 2518(1)(b) and 2518(4)(c).

4. Minimization

Finally, defendants argue that the Title III order of July 28, 1982, was executed without proper minimization. Defendants further contend that they were entitled to an evidentiary hearing on the issue, which the district court refused to grant.

In support of their argument, defendants rely on 18 U.S C. § 2518(5) which provides that every surveillance order "shall contain a provision that [the interception] shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter."

In their suppression motion filed with the district court, defendants alleged that the government did not properly limit the scope of the surveillance. The defendants, however, did not give any specific examples of conversations which should not have been monitored. Instead, defendants requested an evidentiary hearing on the issue.

In the order dated June 2, 1987, the district court found that defendants had failed to make a "sufficiently definite, specific, detailed and nonconjectural" showing of a material issue of fact so as to justify an evidentiary hearing on the minimization issue (citing *United States v. Ledesma*, 499 F.2d 36 (9th Cir.), *cert. denied sub nom. Quiroz-Santi v. United States*, 419 U.S. 1024 (1974)). Nevertheless, the court reserved judgment on the issue in order to allow defendants time to submit documents "supporting his contention that insufficient minimization occurred."

On June 10, 1987, the district court issued another order in which it held that the defendants' allegations of improper surveillance were insufficient to justify a hearing on the issue of minimization. Specifically, the court found that most of the examples cited by defendants involved the use of "spot checks" by the agents monitoring the conversations. Relying on *United States v. Losing*, 539 F.2d 1174 (8th Cir. 1976), the court held that such spot checks are permissible in the course of electronic surveillance. Moreover, the court found that defendants had been unable to show a *prima facie* pattern of insufficient minimization over the period of the surveillance as is required by *United States v. Lawson*, 780 F.2d 535 (6th Cir. 1985). Therefore, the court denied defendants' motions for a hearing and motion to suppress.

On appeal, defendants do not argue that the evidence presented to the district court was sufficient to require an evidentiary hearing on the minimization issue. Instead, defendants seem to argue that they were entitled to a hearing as a matter of course because the *government* has the burden of proving that the minimization requirements were met. In their brief on appeal, defendants characterize the district court's ruling as "Kafkaesque" because all the evidence relating to the government's compliance with the minimization requirement remained in the government's possession. Defendants apparently claim that they had a right of access to all of the surveillance records and to present evidence gleaned from the records at an evidentiary hearing.

We find defendants' argument without merit. Defendants' argument is premised on the assumption that the government bears the burden of production and persuasion concerning its compliance with the minimization requirements. However, the law is clear in this circuit that "the burden of production and persuasion rests on the person seeking to suppress evidence." *United States* v. *Smith*, 783 F.2d 648, 650 (6th Cir. 1986). Indeed, in *United States v. Feldman*, 606 F.2d 673 (6th Cir. 1979), *cert. denied sub nom. Zalmanowski v. United States*, 445 U.S. 961 (1980), this court held that the district court correctly allocated the burden when it found that the defendant did not establish a lack of minimization under a Title III order. There, the court observed that "[i]t is well settled that in seeking suppression of evidence the burden of proof is upon the defendant to display a violation of some constitutional or statutory right justifying suppression." 606 F.2d at 679, *aff'g United States v. Giacalone*, 455 F. Supp. 26, 37-38 (E.D. Mich. 1977). *See also United States v. Garcia*, 785 F.2d 214, 221-22 (8th Cir.), *cert. denied sub nom. Barker v. United States*, 475 U.S. 1143 (1986). *Cf. United States v. Cantu*, 625 F. Supp. 656, 675 n.36 (N.D. Fla. 1985), *aff'd*, 791 F.2d 940 (11th Cir. 1986). *See generally* W. Ringel, *Searches, Seizures, Arrests, and Confessions* § 20.4 (2d ed. 1987).

More fundamentally, defendants' reliance on the burden of proof to support their argument is misplaced here. Who bears the burden of production and persuasion at the evidentiary hearing is irrelevant to the separate issue of whether an evidentiary hearing should be held in the first place. And, as the district court ruled, a defendant must make at least some initial showing of contested facts to be entitled to such a hearing. Moreover, the record shows that defendants did receive much of the information they sought regarding the scope of surveillance. In fact, defendants were provided with copies of all the wiretap applications and all the wiretap authorization orders, as well as the logs and the tapes made during the course of the electronic surveillance. In addition, the district court ordered the government to provide copies of transcripts of intercepted conversations that had been prepared. Because defendants had all the information they needed to make a minimization challenge if one were warranted, the district court clearly did not abuse its discretion in denying an evidentiary hearing when defendants failed to show that minimization may not have occurred.

For the foregoing reasons, the defendants' convictions are AFFIRMED.